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Contribution among Negligent Tortfeasors: The New Rule and Beyond: *Royal Indemnity Co. v. Aetna Casualty & Surety Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975)

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Note

Contribution Among Negligent Tortfeasors: The New Rule and Beyond

Royal Indemnity Co. v. Aetna Casualty & Surety Co., 193 Neb. 752, 229 N.W.2d 183 (1975).

I. INTRODUCTION

In *Royal Indemnity Co. v. Aetna Casualty & Surety Co.*,[1] the Nebraska Supreme Court was presented with an opportunity to determine whether there exists in Nebraska a right of equitable contribution between negligent judgment debtors after one such tortfeasor has discharged either the entire judgment or an amount exceeding his share of such liability. While *Royal Indemnity* represented only the third instance[2] in the last half century in which this issue was addressed by the Nebraska Supreme Court, this modicum of Nebraska decisional law had, until this decision, been interpreted as prohibiting contribution among joint tortfeasors.[3] Unlike a majority of American jurisdictions which have enacted laws allowing contribution in some degree among negligent tortfeasors, Nebraska has no such statute.[4]

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1. 193 Neb. 752, 229 N.W.2d 183 (1975).
2. Farmer's Elevator Mut. Ins. Co. v. American Mut. Liab. Ins. Co., 185 Neb. 4, 173 N.W.2d 378 (1969); Tober v. Hampton, 178 Neb. 858, 136 N.W.2d 194 (1965). *See also* Andromidas v. Theisen Bros., 94 F. Supp. 150 (D. Neb. 1950), which was decided during this period and interpreted Nebraska case law as prohibiting contribution among negligent tortfeasors.
3. After an exhaustive review of Nebraska case law, a commentator recently concluded that "[i]t seems clear that the Nebraska Supreme Court does not allow contribution between joint tortfeasors and is not likely to do so in the future." Busick, *Contribution and Indemnity Between Tortfeasors in Nebraska*, 7 CREIGHTON L. REV. 182, 204 (1974).
4. To date, thirty-seven states sanction contribution among joint tortfeasors. In 1939, the National Conference of Commissioners on Uniform State Laws approved the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 57 (1975). In 1955, a revision of this act was

The fact that Nebraska's erstwhile rule prohibiting contribution had as its sole precursor the English common law required the Nebraska Supreme Court to review and analyze that common law foundation in addition to relevant Nebraska decisions. In so doing, the court, in an articulate decision authored by Justice Brodkey, placed its imprimatur on the ability of a negligent co-tortfeasor to proceed against other judgment-debtors and seek equitable contribution when he had been forced to discharge more than his "proportional share"[5] of such liability. While recognizing the valid policy considerations that militate against allowing contribution among intentional or knowing wrongdoers, the court held that those policy considerations were unpersuasive when applied to joint tortfeasors whose liability was occasioned upon acts of mere negligence.

This note will review the court's analysis in *Royal Indemnity Co. v. Aetna Casualty & Surety Co.*,[6] and highlight the basis the court used to determine that prior Nebraska case law had erroneously applied relevant common law principles. Finally, there will be a discussion of several of the potential defenses which may be asserted to deny a right of contribution and whether such defenses should be sustained in light of the policy reasons underlying the *Royal Indemnity* decision.

II. THE FACTS OF THE CASE

Royal Indemnity was the outgrowth of a negligence action involving three defendants. The original action resulted from the consolidation of individual suits brought by three separate parties against all the defendants seeking to recover for fire losses allegedly caused by the latter's concurrent negligence.[7] Royal Indemnity

approved by the Conference. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, 12 U.L.A. 63 (1975). Ten states have enacted the 1939 Act and six states have as yet adopted the 1955 revision. The 1939 Uniform Act is in force in Arkansas, Delaware, Hawaii, Maryland, Mississippi, New Jersey, New Mexico, Pennsylvania, Rhode Island and South Dakota. The 1955 revision has been adopted by Alaska, Massachusetts, Nevada, North Carolina, North Dakota and Tennessee. Additionally, twelve other states have enacted various forms of legislation that afford a right of contribution among negligent tortfeasors. Prior to *Royal Indemnity*, nine states allowed contribution by judicial mandate. *See* Allen, *Joint Tortfeasors—A Case For Unlimited Contribution*, 43 MISS. L.J. 50 (1972); Wilson, *The Rule Against Contribution and Its Status in Nebraska*, 37 NEB. L. REV. 820, 822 (1958).

5. 193 Neb. at 764, 229 N.W.2d at 190.
6. 193 Neb. 752, 229 N.W.2d 183 (1975).
7. It was uncontroverted at trial that the fire giving rise to the action was caused by an unshielded resister coil on the underside of a forklift coming into contact with highly combustible material. The defendants in the action were L & M Paper Co., the owner of the fork-

Company ("Royal"), Aetna Casualty and Surety Company ("Aetna"), and Iowa National Mutual Insurance Company ("Iowa National"), as insurers of the defendants, actively participated in the suit by defending their respective insureds.[8] After the jury found that the plaintiffs' losses were the result of each defendant's affirmative negligence, judgments were entered in favor of each plaintiff.[9] Exclusive of costs the combined judgments for the three plaintiffs totalled $469,031.35.[10] After the plaintiffs' verdicts had been affirmed by the Nebraska Supreme Court in *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*,[11] the several plaintiffs instituted garnishment proceedings to collect the entire judgment from Royal. Although each defendant had been found negligent and despite the fact it was the insurer of only one of the judgment-debtors, Royal was compelled to discharge the entire judgment, which with accrued costs totalled $520,313.01.[12]

Upon discharge of that judgment, Royal, as the subrogee of the interests of its insured judgment-debtor, instituted the instant action. It alleged that it was equitably entitled to reimbursement from each party in an amount that would result in each of the original co-defendants or his respective insurer bearing an equal share of the liability for the judgment. More precisely, Royal sought contribution from Aetna in the amount of $173,437.67 and a like amount from Iowa National or its insured judgment-debtor, Phil D. Fitzwater.[13] For reasons that are unclear, Fitzwater was the only party joined in the action by Royal who had been held personally liable in the seminal action.[14]

Demurrers to the plaintiff's petition were posed by each defendant, premised upon the contention that "an attempt to obtain con-

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lift; All Makes Fork Lift Service, a partnership who sold the forklift to L & M Paper Co.; Yale and Towne, Inc., the manufacturer of the forklift; and Phil D. Fitzwater and Gerald E. Gathmann, the All Makes partners. The plaintiffs were Libbey-Owens Ford Glass Co. and Henningsen Foods, Inc., adjacent tenants of L & M Paper Co., and O.J. Miller, owner and lessor of the premises. Libbey-Owens Ford Glass Co. v. L & M Paper Co., 189 Neb. 792, 793, 205 N.W.2d 523, 526 (1973).

8. Yale and Towne, Inc., L & M Paper Co., and All Makes Fork Lift Service were insured by Royal Indemnity Co., Aetna Casualty & Surety Co., and Iowa National Mutual Insurance Co., respectively. 193 Neb. at 753-54, 229 N.W.2d at 184.
9. Verdicts were returned in favor of Henningsen Foods, Libbey-Owens and O.J. Miller in amounts of $380,596.88, $43,434.17 and $45,000.00, respectively. *Id.*
10. *Id.*
11. 189 Neb. 792, 205 N.W.2d 523 (1973).
12. Brief for Appellant at 9-10.
13. *Id.*
14. 193 Neb. at 754, 229 N.W.2d at 184.

tribution from an alleged liability insurance carrier of a joint tortfeasor . . . is contrary to the law of Nebraska."[15] The subsequent action by the trial court sustaining each of the defendant's demurrers formed the basis of the plaintiff's appeal to the Nebraska Supreme Court.

The appellant did not contend that the trial court had erred by misconstruing the supreme court's prior pronouncements regarding the permissibility of contribution actions among co-judgment-debtors. Royal conceded that "[t]o date there has been no reported, unreversed case in which contribution has been allowed."[16] It argued, however, that the present judicial stance toward the right of contribution among negligent tortfeasors had mistakenly failed to recognize that the common law prohibition against contribution was intended to be limited to instances involving *intentional* wrongdoers.

III. LEGAL ANALYSIS

The no-contribution rule under assault in *Royal Indemnity* is an exception to the general rule allowing contribution among co-debtors when one party satisfies more than his proportional share of such debt or obligation.[17] This universal rule has received the countenance of Nebraska courts.[18] The no-contribution exception was created by the oft-cited case of *Merryweather v. Nixan*[19] which held that contribution would not be allowed between judgment debtors found jointly liable for trover.[20] The supreme court in *Royal Indemnity* properly recognized "the fact that the tortfeasors in . . . [*Merryweather*] . . . were intentional wrongdoers,"[21] a critical factual limitation that had been overlooked or ignored by past

15. Brief for Appellee Aetna at 4.
16. Brief for Appellant at 22.
17. 4 POMEROY, EQUITY JURISPRUDENCE § 1418 (5th ed. 1941); RESTATEMENT OF RESTITUTION § 81 (1937).
18. Exchange Elevator Co. v. Marshall, 147 Neb. 48, 22 N.W.2d 403 (1946).
19. 101 Eng. Rep. 1337 (K.B. 1799). *See* Reath, *Contribution Between Persons*, 12 HARV. L. REV. 176 (1898). In fact, while *Merryweather* is commonly cited as the case in which the no-contribution exception was first adopted, the British antipathy for contribution actions was exhibited long before the *Merryweather* decision. In Evert v. Williams, (Ex. 1725), two thieves appeared before the court and asked for an apportionment of their "earnings." The bill was dismissed with costs paid by the defendant. The plaintiff's solicitor was fined, and the defense counsel was deported. The plaintiff and defendant were hanged. Put simply, contribution was not allowed.
20. *See* Reath, *supra* note 19, at 179.
21. 193 Neb. at 756, 229 N.W.2d at 186.

Nebraska courts. Moreover, the court accepted the appellant's contention that *Merryweather* had been limited to its narrow factual pattern by the subsequent case of *Adamson v. Jarvis*,[22] wherein it was stated that

> from reason, justice and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.[23]

Buttressing its premise that Nebraska's no-contribution rule was alien to its common law origin, the appellant placed great reliance on early Nebraska decisions in which the availability of court-enforced contribution was first addressed. An analysis of these early pronouncements led Justice Brodkey to note that

> [e]arly cases in this jurisdiction strongly indicate that Nebraska followed the English Law, and would permit contribution among joint tortfeasors where the party seeking contribution had not been guilty of intentional wrongdoing.[24]

Johnson v. Torpy[25] was such a case. It was a wrongful death action brought under Nebraska's then existent Dramshop Act. Both Johnson and Torpy had sold liquor to a known habitual drunkard, actions which allegedly contributed to the drunkard's death. The latter's wife instituted a successful negligence action against Torpy. Torpy prevailed in a subsequent action against Johnson for contribution but this decision was reversed by the supreme court. It stated that the sale of liquor to an habitual drunkard not only gave rise to a civil action by the injured party but also was a statutory violation for which there was imposed a "severe penalty."[26]

> In determining whether the right of contribution exists in favor of one wrongdoer against another the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful. If not, he may recover against one equally culpable, but otherwise he is without remedy.[27]

The court indicated that because Torpy knew that the decedent was an habitual drunkard, he was presumed to have known that he was

22. 130 Eng. Rep. 693 (1827).
23. *Id.* at 696. While not mentioned by the supreme court, it is to be noted that England abolished the no-contribution rule embodied in *Merryweather* by enactment of the Married Women and Tortfeasor Act of 1935. For an explanation of this statute, see SALMOND, LAW OF TORTS § 168 (16th ed. 1973).
24. 193 Neb. at 757, 229 N.W.2d at 186.
25. 35 Neb. 604, 53 N.W. 575 (1892).
26. *Id.* at 606, 53 N.W. at 576.
27. *Id.*

committing an unlawful act. Upon remand, Torpy was unable to overcome this presumption.[28] While in this particular decision contribution was not allowed, it is significant that the Nebraska court embraced the *Jarvis* limitation that contribution would only be denied in cases where the act committed was deliberate or "intentionally wrongful." Moreover, in defining what type of acts were deemed wrongful, *Torpy* held that a violation of a statute which also gives rise to a civil action would not necessarily bar the plaintiff's right to enforce contribution but would create a presumption that such conduct was intentional which, if not rebutted, would deny contribution.

In *Royal Indemnity*, three other cases—none decided after 1908—were advanced by the appellant as consistent with *Torpy*, including one decision in which the Nebraska Supreme Court had allowed contribution.[29]

The appellees based their defense of the rule forbidding contribution between tortfeasors on two relatively recent Nebraska decisions which in unequivocal terms stated that no right of contribution among tortfeasors existed in Nebraska.[30]

In *Tober v. Hampton*,[31] a decision that did not even involve the issue of contribution, the Nebraska Supreme Court obliterated the distinction recognized both at common law and in previous Nebraska decisions that denied contribution only when the liability was a result of intentional conduct. In *Tober*, the plaintiff's house

28. Torpy v. Johnson, 43 Neb. 882, 62 N.W. 253 (1895).
29. First Nat'l Bank v. Avery Planter Co., 69 Neb. 329, 95 N.W. 622 (1903) and Schappel v. First Nat'l Bank, 80 Neb. 708, 115 N.W. 317 (1908), involved the same factual circumstances. Both cases dealt with the wrongful attachment of a debtor's property by a sheriff. Because the creditors joined in the defense of the trespass action against the sheriff, they were deemed to be joint tortfeasors *ab initio*. The suits were instituted in order to gain contribution for the creditors' joint judgment liability. Because the action was defended in good faith, with no intention that the trespass be committed, *Avery* allowed contribution to the extent of each creditor's lien on the wrongfully attached property. This result was later affirmed in *Schappel*.

    In Sharp v. Call, 69 Neb. 72, 95 N.W. 16 (1903), the court denied an action for contribution among corporate trustees who had been found liable for the fraudulent disbursement of trust funds on the premise that the acts committed were intentional and involved moral turpitude. The court maintained, however, the dichotomy that had been struck in *Torpy* between intentional and unintentional acts and clearly implied that contribution would have been allowed had the acts been adjudged unintentional.
30. *See* note 2 *supra*.
31. 178 Neb. 858, 136 N.W.2d 194 (1965).

sustained $6,500 in damages as a result of both the defendant's and gas company's negligence.[32] Prior to the suit, the plaintiff and gas company entered into a "loan agreement" whereby the plaintiff received $3,500 which was repayable to the gas company only out of any net proceeds that he might recover against the defendant.[33] In the "loan agreement," the plaintiff also gave the gas company full power to prosecute its action against the defendant.[34] The supreme court, in an opinion by Justice Brower, held that the purported "loan agreement" was invalid and was instead a complete settlement of the plaintiff's claim against the gas company. By viewing the $3,500 as a settlement rather than a "loan," the court applied a *pro tanto* reduction in the amount of damages that the plaintiff could assert against the defendant. The court then resurrected the loan agreement as valid in holding that the plaintiff ceased to be the real party at interest in the action since the amount of damages which he could potentially recover (after application of the *pro tanto* bar) was less than his obligation of repayment to the gas company under the terms of the "loan agreement."

The obvious inconsistencies vis-à-vis the validity of the loan agreement would have been the decision's sole significance had not the court also addressed the issue of contribution.[35] For unstated reasons, the court commenced a "cursory review" of the status of contribution in the State of Nebraska.

> Apart from statute, the general rule . . . is that one of several wrongdoers, who has been compelled to pay the damages for the wrongs committed, cannot compel contribution from others who participated in the commission of the wrong. This is a rule not only of the common, but of the civil law, and it obtains in equity as well as at law. . . . We think the rule is sound and is amply sustained by the reasons set out immediately following it in 18 C.J.S. § 11, p. 14. It is adopted by this court . . .[36]

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32. *Id.* at 877, 136 N.W.2d at 206.
33. *Id.* at 864-66, 136 N.W.2d at 199-200.
34. *Id.* While nothing in the opinion indicates whether the defendant was made aware of the existence of the "loan agreement," it seems reasonable to suggest that the *Tober* court was influenced by the obvious prejudicial effect that such an agreement had on the defendant. While such settlement agreements (commonly referred to as Mary Carter Agreements) are outside the scope of this note, the champertous nature of such agreements and their prejudicial effect on non-agreeing defendants are cogently illustrated in Note, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 So. CAL. L. REV. 1393 (1974).
35. For an analysis of the supreme court's now-you-see-it-now-you-don't treatment of the loan agreement, see Note, *Joint Tortfeasors—Validity of Loan Agreements and Use of Pro Tanto Bar*, 45 NEB. L. REV. 790 (1966).
36. 178 Neb. at 873, 136 N.W.2d at 204.

The court inexplicably proceeded to overrule expressly *First National Bank v. Avery Planter Co.*[37] and *Schappel v. First National Bank*,[38] both post-*Torpy* decisions which had countenanced contribution upon a showing by the claimant that his liability had resulted from acts of good faith and not intentional wrongdoing. Justice Brodkey's review of the *Tober* decision charitably stated that "the necessity of the court's ruling on the issue of contribution is unclear."[39]

Farmer's Elevator Mutual Insurance Co. v. American Mutual Liability Insurance Co.[40] was the final case considered by the court in *Royal Indemnity*. It involved an action brought in federal court by a construction company employee against a defendant upon whose premises his injury had occurred. The defendant brought a third-party action against the construction company and judgments in both the first and second-party actions found both the construction company and the first-party defendant negligent. A declaratory judgment proceeding followed in state court in order to determine which party's insurer was liable for the plaintiff's damages. In an opinion written by Justice Carter, it was held that the construction company's insurer was not liable to indemnify the first-party defendant because of certain language included in the policy contract. The court stated further, however, that "both joint tort-feasors being active wrongdoers, contribution cannot be maintained by one against the other."[41] While the court left the implication that it had not completely slammed the doors on arguments *in futuro* that contribution might be proper in instances where a party's liability was caused by the doctrine of respondeat superior or some other type of vicarious liability, the *Farmer's Elevator* dictum made it fully apparent that an action for contribution would not lie between persons whose liability was grounded upon acts of negligence—however unintentional they might be.

In *Royal Indemnity*, the appellants forcefully argued in their brief that the initial dichotomy developed by *Merryweather* and its English progeny was borne from the strong British policy that the courts should not allow a litigant to use them to help him profit from his own wrongdoing.[42] Moreover, to deny contribution would serve as a deterrent to those about to commit intentional torts.

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37. 69 Neb. 329, 95 N.W. 622 (1903). *See* note 29 *supra*.
38. 80 Neb. 708, 115 N.W. 317 (1908). *See* note 29 *supra*.
39. 193 Neb. at 760, 229 N.W.2d at 188.
40. 185 Neb. 4, 173 N.W.2d 378 (1969).
41. *Id.* at 14-15, 173 N.W.2d at 385.
42. Brief for Appellant at 34-35.

Conversely, Royal contended that same dichotomy is also grounded upon the fact that the denial of contribution does not deter the acts of tortfeasors who are liable for mere negligence.[43] Such arguments were not lost on the Nebraska Supreme Court in this instance as the court recognized the

> obvious lack of sense and justice in a rule which permits the entire burden of a loss for which the two defendants were equally, unintentionally responsible, to be shouldered by one alone, according to the accident of a successful levy, the existence of liability insurance, the plaintiff's whim or spite, or his collusion with other wrongdoers, while the latter goes scot free.[44]

The *Royal Indemnity* court realigned itself with the dichotomy drawn by *Johnson v. Torpy*,[45] denying contribution when the tortfeasor's liability resulted from wrongful or intentional misconduct, but holding such relief proper when common liability was occasioned by acts of negligence or inadvertence.

> That there may be some basis for . . . [the deterrence] . . . theory in cases in which persons directly contemplate the commission of a wrongful act is obvious, but that it applies equally in cases of unintentional wrong strains one's credulity. To believe that the rule of no contribution will tend to make a careless person careful, or that a motorist who is not deterred from carelessness by fear of personal danger will be affected in his conduct by a legal rule of no contribution between joint wrongdoers, seems to us wholly fanciful.[46]

Thus, the court overruled *Tober v. Hampton*[47] and *Farmer's Elevator*[48] to the extent that each was inconsistent with the now effective rule that

> a right of equitable contribution exists among judgment debtors jointly liable in tort for damages negligently caused, which right becomes enforceable on behalf of any party when he discharges more than his proportionate share of such judgment.[49]

IV. ATTENDANT SUBSTANTIVE AND PROCEDURAL ISSUES

Recognizing the unequivocal trend[50] exhibited by legislative assemblies and state tribunals in providing approbation for contribu-

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43. *Id.*
44. 193 Neb. at 763-64, 229 N.W.2d at 189, *quoting* PROSSER, LAW OF TORTS § 50 (4th ed. 1971).
45. 35 Neb. 604, 53 N.W. 575 (1892).
46. 193 Neb. at 763, 229 N.W.2d at 189.
47. 178 Neb. 858, 136 N.W.2d 194 (1965).
48. 185 Neb. 4, 173 N.W.2d 378 (1969).
49. 193 Neb. at 764, 229 N.W.2d at 190.
50. *See* note 4 and accompanying text *supra.*

tion actions between joint tortfeasors, the bulk of relevant contemporary commentary deals not with the basic propriety of such actions[51] but instead with the precise application of such a right under a multitude of factual variants. Despite the supreme court's unambiguous adoption of a rule allowing contribution between negligent tortfeasors, *Royal Indemnity* invites a discussion of several of the numerous substantive and procedural issues which clothed this action.

A. Direct Contribution from a Liability Insurer

While *Royal Indemnity* answered few of the attendant questions that are likely to arise in subsequent contribution actions, one procedural requirement was announced which had the at least temporary effect of conceding the appellant the battle but awarding the war to the appellees. The appellees' demurrer included a subtle two-tier argument which proved to be pivotal to the court's ultimately granting relief. While it was first averred that contribution was improper in Nebraska, the demurrers additionally challenged the right of the plaintiff to seek contribution directly from a liability insurer.[52] While recognizing that Royal was the real party at interest in the litigation as the subrogee of its insured, the court noted that such a direct action suit against Aetna and Iowa National was not authorized either by statute or under their respective policies.[53] Since Phil D. Fitzwater was the only actual judgment debtor of the seminal action who had been joined by Royal in the subsequent contribution action, the demurrers of Aetna and Iowa National were affirmed. The court reversed the trial court's dismissal of the plaintiff's action against Fitzwater.[54] It made the latter ruling after conceding that Fitzwater might be able ultimately to hold Iowa National, his liability insurer, liable for his contribution liability.[55]

B. Accrual of Rights and the Statute of Limitations

The specific language of *Royal Indemnity* vis-à-vis the accrual of a right to seek contribution is unequivocal. A right of contribu-

51. At least one commentator has asserted that the practical effects of contribution run contrary to other valid policy objectives such as risk spreading. Professor James has argued that contribution will allow liability insurance carriers to shift part of their loss to uninsured co-defendants. James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).
52. Brief for Appellee Aetna at 12-16.
53. 193 Neb. at 765-66, 229 N.W.2d at 190-91.
54. *Id.* at 754, 229 N.W.2d at 184.
55. *Id.* at 766, 229 N.W.2d at 191.

tion becomes enforceable on behalf of any party "when he *discharges* more than his proportionate share of judgment."[56] This requisite that the judgment, or at least a portion in excess of the tortfeasor's proportional share, must actually be discharged is identical to the provisions of both Uniform Acts.[57]

It seems eminently fair and reasonable that the statute of limitations applicable to contribution actions should not begin to run until the action has ripened by the claimant's discharge of the judgment. While *Royal Indemnity* was silent on this question, other jurisdictions have rebuffed arguments asserting that the right to seek contribution is derivative and as such is barred at the expiration of the statutory period in effect for the original plaintiff's action.[58] Prior Nebraska case law indicates that the statute of limitations of contribution actions will begin to run when the liability to the plaintiff has been discharged.[59]

1. Joint Liability Should Not Be Required

Both Uniform Acts allow for contribution actions to lie between "joint tortfeasors . . . whether or not judgment has not been recovered against all or any of them."[60] The latter phrase was deliberately included by the draftsmen to indicate that joint and several judgment liability is not a prerequisite for maintaining an action for contribution under the Acts.[61] While this same tact has been generally followed by states who have chosen to enact other forms of statutes authorizing contribution, at least nine states limit the right of contribution to joint judgment debtors.[62] The question arises then as to whether the language of *Royal Indemnity* sanctions

56. *Id.* at 764, 229 N.W.2d at 190 (emphasis added).
57. 12 U.L.A. 57 § 2(2) (1975); 12 U.L.A. 63 § 1(b) (1975).
58. Keleket X-ray Corp. v. United States, 275 F.2d 167 (D.C. Cir. 1960); McKay v. Citizen's Rapid Transit Co., 190 Va. 851, 59 S.E.2d 121 (1950); Ainsworth v. Berg, 253 Wis. 438, 34 N.W.2d 790 (1948).
59. In Weiss v. Weiss, 179 Neb. 714, 716, 140 N.W.2d 15, 17 (1966), it was held that "a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit." (citations omitted).
60. 12 U.L.A. 63 § 1 (1975). The original Uniform Act has language of identical import. *See* 12 U.L.A. 57 § 1 (1975).
61. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT, Commissioners' Prefatory Note, 12 U.L.A. 61 (1975).
62. Michigan, MICH. STAT. ANN. § 27A.2925 (1962); Mississippi, MISS. CODE ANN. § 85-5-5 (1972); Missouri, MO. REV. STAT. § 537.060 (1969); New York, N.Y. GEN. OBLIG. LAWS § 15-101 to 107 (McKinney 1964); North Carolina, N.C. GEN. STAT. § 1B-1 to 6 (1969); Texas, TEX. REV. CIV. STAT. art. 2212 (1971); West Virginia, W. VA. CODE ANN. § 55-7-13 (1966).

actions for contribution between joint tortfeasors or only between joint tortfeasors who share a judgment-debtor status.

The court's holding that neither Aetna nor Iowa National, as the insurers of judgment-debtors, were amenable to suit might be interpreted as allowing contribution only between and among joint judgment-debtors. The court's decision was premised at least to some degree on the observation that neither of the insurers

> were defendants in the Libbey-Owens Ford Glass case, nor was any judgment rendered against either of them in the original action . . . It is clear, therefore, that they are improper defendants in this action . . . .[63]

The court also noted that there was no statutory or judicial authority, which allowed direct action suits against liability insurance carriers,[64] and that neither of the insurance contracts provided for direct action suits by third parties. If it is assumed that the pivotal reason for the holding was the fact that neither Aetna nor Iowa National had been a judgment-debtor in the seminal action, it would seem reasonable to contend that *Royal Indemnity* only countenances actions for contribution against tortfeasors who are also judgment-debtors. This reasoning, however seductive, is defective. Even assuming that *Royal Indemnity* allowed actions for contribution between joint tortfeasors who were not subject to a joint judgment liability, the actions against Aetna and Iowa National would still be improper. *Royal Indemnity* held that a right of contribution exists only against a "joint tortfeasor."[65] Neither Aetna nor Iowa National were joint tortfeasors; each was merely the insurer of joint tortfeasors. Thus, it cannot be stated that the court's refusal to allow the plaintiff's direct action suits against the defendant insurers buttresses the contention that *Royal Indemnity* requires joint judgment liability as a precondition for the right to seek contribution *inter se*. The court's denial of the plaintiff's right to proceed directly against the defendant insurers could be based on the narrower limitation of contribution existing only between joint tortfeasors.

2. *The Next Question: Is "Common Liability" Required?*

While the literal interpretation of *Royal Indemnity* makes it apparent that contribution should be enforceable against tortfeasors who were not parties in the suit brought by the injured party, applying this proposition raises a series of more ponderous questions. Query whether a joint tortfeasor who has discharged more than his proportionate share of liability can seek contribution from an-

63. 193 Neb. at 766, 229 N.W.2d at 190.
64. *Id.* at 765, 229 N.W.2d at 190.
65. *Id.* at 764, 229 N.W.2d at 190.

other joint tortfeasor who has a personal defense which would have made it impossible for the injured party to have recovered directly against him.[66] This problem could ostensibly arise in Nebraska with respect to at least four individual defenses: insulation based on interspousal immunity,[67] the statute of limitations[68] or the Nebraska guest statute,[69] or insulation because the injured party is an employee of an employer tortfeasor with an exclusive and sole remedy under the Nebraska Workmen's Compensation Act.[70]

In those states which have enacted statutory authority for contribution, these questions are typically less burdensome. Both Uniform Acts require that contribution shall only be allowed after a joint tortfeasor has discharged more than his proportionate share of a "common liability."[71] As explained by the draftsmen, "the common obligation contemplated by this act is the common liability to suffer adverse judgment at the instance of the injured person, whether or not the injured person elects to impose it."[72] Hence, under either Uniform Act, a joint tortfeasor would be prohibited from gaining contribution from joint tortfeasors whom the injured party would have been unable to render liable.[73]

Royal Indemnity did not determine whether contribution will only be sanctioned when a common liability is shown. As each of the previously articulated defenses will be presented in future attempts to thwart contribution, the Nebraska Supreme Court should

66. *See* Comment, *Wyoming Contribution Among Joint Tortfeasors,* 9 LAND & WATER L. REV. 589 (1974) and Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action By The Injured Party,* 52 CORNELL L.Q. 407 (1967) [hereinafter cited as Wyoming Comment and Cornell Note, respectively].

67. *See* note 75 *infra.*

68. NEB. REV. STAT. § 25-201 (Reissue 1964).

69. NEB. REV. STAT. § 39-6,191 (Reissue 1974). Unlike many jurisdictions that have held such statutes violative of the due process clause of the fourteenth amendment to the United States Constitution, the Nebraska Supreme Court has upheld the constitutionality of the Nebraska guest statute on two recent occasions. Botsch v. Reisdorf, 193 Neb. 165, 226 N.W.2d 121 (1975); Hale v. Taylor, 192 Neb. 298, 220 N.W.2d 378 (1974). Moreover, the most recent attempt by the Nebraska Legislature to repeal the guest statute was also unsuccessful. NEB. LEG. J. 84th Leg., 1st Sess. 2005 (L.B. 491) (May 21, 1975).

70. NEB. REV. STAT. § 48-101 (Reissue 1974).

71. 12 U.L.A. 57 § 2(2) (1975); 12 U.L.A. 63 § 1(b) (1975).

72. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1, Commissioners' Comment, 12 U.L.A. 64 (1975).

73. Mumford v. Robinson, 231 A.2d 477 (Del. 1967), in which the potential contributor qualified as host of the injured party under the terms of the state guest statute; Congressional Country Club, Inc. v. Baltimore & O. Ry., 194 Md. 533, 71 A.2d 696 (1950), involving workmen's compensation; Baltimore Transit Co. v. State, 183 Md. 674, 39 A.2d 858 (1944), in which the potential contribution defendant was the spouse

not be induced to adopt a dogmatic approach of lumping all the various defenses together and deciding whether all or none will defeat an action for contribution. The question of whether a joint tortfeasor is insulated from actions for contribution because of a personal defense with respect to the injured party will typically involve a collision of competing policy considerations.[74] If contribution is allowed under such circumstances, thereby casting aside the requisite of a common liability, the policy objectives upon which the special defense is ostensibly premised will be foresaken. Conversely, a denial of contribution because of such a special defense would sanction the very types of inequities that *Royal Indemnity* was intended to prevent.

Fortunately, however, this conflict will not always arise. There seems to be no reason to deny contribution when to permit it will not undermine the policy objectives of the particular defense. When, however, they would be necessarily forsaken by allowing contribution, the court should weigh the competing policy considerations. Such a balancing analysis would result in a denial of contribution only in those instances where the conflicting policy's objectives are of a greater magnitude than the equitable underpinnings of contribution and when the application of the latter could only result in the defeat of the more important purposes of the former. Thus, since the effect of contribution on the rationale for particular defenses will vary, the court should consider each defense separately.

Interspousal Immunity. Nebraska courts have not abolished the common law prohibition of tort claims between spouses.[75] This position is based on the desire to preserve family harmony and the

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of the injured party; McKay v. Citizen's Rapid Transit Co., 190 Va. 851, 59 S.E.2d 121 (1950), in which a statute of limitations was a key issue.

74. *See* Cornell Note, *supra* note 66, at 408-12; Wyoming Comment, *supra* note 66, at 599-600.

75. In Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927), the Nebraska Supreme Court held that a wife could not maintain suit against her husband and that any action that was derivative thereto was equally defective.

> The procedural difficulties, the dangers of disrupting the secrecy and serenity of marital relations, the avenue for fraud, the startling innovation in permitting such recoveries, and the clear lack of legislative indorsement all have been assigned as ample reasons for the refusal of the courts to sanction, by supplying statutory interpretation, a new form of litigation requiring unequivocal legislation for its existence. . . . Suits between spouse should be confined as heretofore to those having contractual elements or where there is direct statutory authorization.

Id. at 184-85, 216 N.W. at 298-99.

belief that suits among family members will only imperil that relationship.[76] A policy conflict will arise when a third-party tortfeasor seeks contribution from a tortfeasor who is the spouse of the injured plaintiff. While early decisions denied a right of contribution against a tortfeasor enjoying the defense of interspousal immunity, the modern trend is clearly to the contrary.[77] In *Bedell v. Reagan*,[78] the defendant tortfeasor's third-party complaint for contribution against the husband of the plaintiff was reinstated. The court stated that

> an assertion by a husband against his wife of a third-party plaintiff's defenses to the wife's action would be reasonably calculated to engender marital discord but not to any insuperable degree. Such a regrettable evil must be regarded, however, as more tolerable than a denial of contribution to the third-party plaintiff in cases such as the one at bar.[79]

Thus, the Maine court allowed contribution in spite of the existence of interspousal immunity since the policy considerations of the former *outweighed* those of the latter. It is dubious whether the court's balancing was even necessary. None of the policy objectives underlying interspousal immunity are vitiated by allowing contribution actions to be maintained against the spouse of the injured plaintiff.[80] Marital harmony, as the argument goes, is endangered when tort actions between spouses are allowed. But when contribution actions against the spouse of the injured party are allowed, a suit between the spouses is still not being allowed. Hence the defense of interspousal immunity should not be allowed to deny contribution between a third-party tortfeasor and the spouse of an injured plaintiff.[81]

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76. *See* PROSSER, LAW OF TORTS § 122 at 859-64 (4th ed. 1971).
77. Cornell Note, *supra* note 66, at 408-12.
78. 159 Me. 292, 192 A.2d 24 (1963). For other cases in accord with *Bedell*, see Smith v. Southern Farm Bureau Cas. Ins. Co., 247 La. 645, 174 So. 2d 122 (1965) and Zarella v. Miller, 100 R.I. 545, 217 A.2d 673 (1966).
79. 159 Me. at 299-300, 192 A.2d at 24.
80. Cornell Note, *supra* note 66, at 408-12.
81. This position has been expressed as follows:

> Denying contribution from plaintiff's negligent spouse places an unfair share of the burden of the loss on the third-party tortfeasor by allowing the defense of interspousal immunity to be raised against a person other than a spouse. Such a result is contrary to the trend toward limiting that defense, and it ignores the fact that the primary policy sought to be implemented by the defense, the preservation of domestic harmony, is not violated by permitting contribution. The financial burden imposed on the family, by cutting in half its award from the negligent tortfeasor, is justly imposed because the family unit was as negligent as the third party. Under the common law, the negligence of one spouse would have been imputed to the other and would have acted as a

The Guest Statute. The Nebraska guest statute denies recovery by the guest against the host unless the latter is guilty of "gross negligence."[82] Should a tortfeasor be able to seek contribution from the host after discharging more than his proportionate share of liability if it is shown that the host was guilty of ordinary, but not gross, negligence? The answer to this query must be in the affirmative under the analysis that supports contribution actions against the spouse of an injured plaintiff. Despite the fact that several courts have held that a host driver not directly liable to the guest may effectively raise the guest statute as a defense in a subsequent action for contribution by a third-party tortfeasor,[83] reason and logic should not allow the guest statute to serve as a defense in a contribution suit.[84]

Such statutes are founded upon the recognition that suits between guests and hosts are unusually susceptible to collusion and fraud between the parties in an attempt to shift the loss to the host's insurer.[85] Allowing a third-party tortfeasor to seek contribution from a host who is guilty of less than gross negligence will not advance the potentiality of either fraud or collusion between the host and guest. If the third-party tortfeasor has already been rendered liable for injuries sustained by the guest, the possibility of the guest and host then entering into a collusive agreement is no more likely than in any other factual situation involving one injured party and two tortfeasors. The guest statute should have no bearing on the issue of the equitable distribution of liability after such liability has already been established within the parameters of the guest statute.[86]

Workmen's Compensation. The Nebraska Workmen's Compensation Act provides that the receipt of any benefits by an employee from an employer for personal injuries constitutes a release to the employer for any other claims or demands at law.[87] The query

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total bar to recovery.
Id. at 411-12.

82. NEB. REV. STAT. § 39-6,191 (Reissue 1974).
83. Troutman v. Modlin, 353 F.2d 382 (8th Cir. 1965) (applying Arkansas law); Lutz v. Boltz, 48 Del. Supp. 197, 100 A.2d 647 (1953); and Burmeister v. Younstrom, 81 S.D. 578, 139 N.W.2d 226 (1965).
84. Cornell Note, *supra* note 66, at 415.
85. PROSSER § 34 at 187. Prosser also notes that guest statutes have been premised on the theory that "one who receives a gratuitous favor in the form of a free ride has no right to demand that his host exercise ordinary care not to injure him." *Id.*
86. *See* Shonka v. Campbell, 160 Iowa 1178, 1183, 152 N.W.2d 242, 246 (1967) (Mason, J., dissenting).
87. NEB. REV. STAT. § 48-148 (Reissue 1974):

> If any employee . . . files any claim with, or accepts any claim from such employer, . . . on account of personal in-

is whether an employer should be able to assert such a release as a complete defense in an action for contribution brought by a third-party tortfeasor. Unlike the defenses of interspousal immunity and the guest statute, allowing a tortfeasor to seek contribution from an employer who has paid workmen's compensation benefits to the injured employee undermines the very purpose of the act as well as being violative of its statutory provision of exclusivity.[88]

In *Beal v. Southern Union Gas Co.*,[89] contribution was not allowed against an employer who had asserted as a complete defense its payment of workmen's compensation benefits to the employee who subsequently gained a judgment against the third-party seeking contribution against the employer. The New Mexico Workmen's Compensation Act provided that benefits paid by employers under the act released them from any other liability.[90] It was held that a right of contribution under the circumstances would render such words of exclusion meaningless.[91]

While this issue has not been addressed by the Nebraska Supreme Court, a recent federal court opinion applied Nebraska law and held that a third-party tortfeasor could not seek contribution or indemnity from the employer of an injured party after the latter had received workmen's compensation benefits from the employer. In *Petznick v. Clark Equipment Co.*,[92] Judge Denney dismissed the defendant's third-party complaint for either contribution or indemnity against the plaintiff's employer on the grounds that "[t]he Nebraska Supreme Court has repeatedly emphasized that the provisions of the Workmen's Compensation Act are exclusive of all liability as to those subject to it."[93]

> jury, or makes any agreement, or submits any question to the [Workmen's Compensation] court under said sections, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

88. *See* Cornell Note, *supra* note 66, at 415-16, Wyoming Comment, *supra* note 66, at 603-05.
89. 62 N.M. 38, 304 P.2d 566 (1956).
90. N.M. STAT. ANN. § 59-10-5 (1974), provides:
> Any employer who has elected to and has complied with the provisions of this act . . . shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as in this act provided; and all causes of action, actions at law, suits in equity, and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to any such employee and accruing to any and all persons whomsoever, are hereby abolished except as in this act provided.

91. 62 N.M. at 41, 304 P.2d at 568.
92. 333 F. Supp. 913 (D. Neb. 1971).
93. *Id.* at 914.

The result rendered in *Petznick* should not be altered because of *Royal Indemnity*'s newly heralded right to seek equitable contribution. Even if the exclusivity of compensation benefits was not subject to statutory amplification under the Workmen's Compensation Act, a third-party tortfeasor should still not have the right to seek contribution from an injured party's employer since the Workmen's Compensation Act's abrogation of common law defenses has as its *quid pro quo* the absolute yet limited liability as determined from the schedules therein.[94]

V. CONCLUSION

Royal Indemnity v. Aetna Casualty & Surety Co. marks the first instance in over a half century when the Nebraska Supreme Court has given careful analysis to the question of whether a co-tortfeasor, after discharging judgment in favor of an injured plaintiff, may proceed against other co-tortfeasors and seek contribution to the extent that each negligent party bears his proportionate share of the total liability. After casting aside as spurious any assertion that the rule prohibiting contribution between intentional tortfeasors has any relevance to the propriety of such actions between negligent tortfeasors, the Nebraska Supreme Court held that no persuasive reasons exist that outweigh the obvious equitable results afforded by contribution. Hence, *Royal Indemnity* adopts the enlightened rule that in Nebraska, contribution actions will lie between negligent tortfeasors.

For now, *Royal Indemnity* may be properly embraced with a healthy degree of rectitude by the Nebraska practitioner. Its future application is another matter. However arbitrary and analytically suspect, the heretofore extant no-contribution rule at least imbued this area of tort law with a degree of predictability. *Royal Indemnity* portends no such comfort. Questions remain relating to whether a tortfeasor, when sued for contribution, may assert defenses against a tortfeasor that would have been successful in defeating an action brought by the injured party. As has been suggested herein, only the exclusivity of remedies awarded under the Nebraska Workmen's Compensation Act should exculpate a joint tortfeasor from suffering judgment from another joint tortfeasor to the extent of his proportionate share of the common liability.

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94. *See* Page, *The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue His Employer*, 4 B.C. IND. & COM. L. REV. 555 (1963).